

2003

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## Citation Information

Sarbit, Lara. "The Reality beneath the Rhetoric: Probing the Discourses Surrounding the Safe Third Country Agreement." *Journal of Law and Social Policy* 18. (2003): 138-158.  
<https://digitalcommons.osgoode.yorku.ca/jlsp/vol18/iss1/7>

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# THE REALITY BENEATH THE RHETORIC: Probing the Discourses Surrounding the *Safe Third Country Agreement*

LARA SARBIT\*

## RÉSUMÉ

Après les attaques terroristes du 11 septembre 2001, le gouvernement canadien a poursuivi les négociations avec les États-Unis au sujet de l'*Entente concernant les tiers pays sûrs*. Cette entente, qui interdit la participation au système de détermination du statut de réfugié aux réfugiés qui ont voyagé dans un pays réputé sécuritaire, a été prise en considération au Canada depuis la fin des années 1980. Bien que les tentatives de donner aux États-Unis le titre de pays sûr aient échoué depuis le 11 septembre 2001, le Canada a repris ses efforts et les États-Unis ont manifesté en retour leur intention de discuter. Le moment particulier de cette initiative a conduit l'auteure du présent article à se demander quel impact les attaques terroristes aux États-Unis ont eu sur l'élaboration de la politique canadienne relative aux réfugiés.

À la suite d'un examen attentif du large contexte social entourant les discussions sur l'*Entente concernant les tiers pays sûrs*, l'auteure conclut que le 11 septembre 2001 a contribué à renforcer les discours sur les abus du système du statut de réfugié élaborés au cours des dernières années. Ainsi, l'*Entente concernant les tiers pays sûrs* a pour objet le traitement des abus du système du statut de réfugié par des migrants économiques et des terroristes éventuels. Toutefois, les observations de l'auteure des détails de l'entente lui permettent d'affirmer que l'*Entente concernant les tiers pays sûrs* est inefficace pour dissuader les migrants économiques ou pour accroître la sécurité nationale. Ces discours sur les abus tendent plutôt à masquer la nature essentielle de l'entente et son effet adverse sur les réfugiés vulnérables. Cet article propose par conséquent d'étudier la réalité qui se dissimule sous la rhétorique de l'*Entente concernant les tiers pays sûrs* afin de comprendre les effets de cette législation et de mettre en question sa disposition, en tenant compte des valeurs humanitaires canadiennes.

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The way in which refugees are viewed can have a significant impact on the development of refugee policy. Images of desperate individuals fleeing their homeland due to massive human rights abuses evoke responses of empathy and humanitarian aid. In contrast, images of refugees as economic migrants jumping the immigration queue or as potential threats to national security can result in concern, anger, or even fear. The United Nations definition of a refugee focuses on the former image but takes into account protection mechanisms to address the latter.<sup>1</sup> Canadian refugee law also seeks to balance rights of refugees requiring asylum with procedures in place to protect national security and to reject inappropriate asylum claims.<sup>2</sup> Recent Canadian refugee policy, however, has tilted further away from humanitarian refugee protection goals.

Heavily publicized events in the last few years, such as the boatloads of Chinese economic migrants who arrived on Canada's shores in 1999 and the September 11<sup>th</sup>, 2001 terrorist attacks in New York, have increased awareness and concern for abuse of the refugee system. I argue that these discourses of abuse by economic migrants and potential terrorists created an environment in which the *Safe Third Country Agreement*<sup>3</sup> could be signed in spite of its detrimental effect on refugees. I submit that the *Safe Third Country Agreement* is not effective in balancing humanitarian refugee concerns with efforts to combat economic or security abuses. Rather, these discourses have been used to enact legislation that merely reduces the rights of refugees and undermines Canada's humanitarian world role. In this paper I examine the reality beneath the rhetoric of the *Safe Third Country Agreement* to reveal its inconsistency with policy goals and Canadian values.

It is necessary to begin this study with a brief historical overview of the United Nations' development of international refugee law. It is also important to understand how this international law influenced the evolution of a humanitarian focused Canadian refugee system. With this history in mind, the *Safe Third Country Agreement* is analyzed as a policy of interdiction that reduces the number of refugee claimants granted access to the Canadian system. The potential problematic effects of the *Agreement* on refugees are revealed. Given the negative impact on refugees, I question more thoroughly the government's justifications for the *Safe Third Country Agreement*. As a result, I explore government concerns of abuse of the refugee system by economic migrants and the impact of security concerns following September 11<sup>th</sup>, 2001.

In the final analysis, I conclude that the *Safe Third Country Agreement* does not stand up to scrutiny as a solution to concerns of abuse by economic migrants or by potential security risks. Rather, these discourses of abuse mask the problematic nature of the *Safe Third Country Agreement* in terms of the rights of refugees and Canada's

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1. *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, [1969] Can. T.S. No. 6 (*UN Convention*).
  2. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*).
  3. *Regulations Amending the Immigration and Refugee Protection Regulations*, C. Gaz. 2002.I.3241.

humanitarian values. This conclusion is important not only to potential refugees but also to current members of Canadian society. For, as Galloway acknowledges:

In such times, it is important to remember that immigration law is not merely a set of technical rules and instrumental devices that can be manipulated to achieve a variety of ends. It is a set of doctrines that attempts to encapsulate a vision of how we see ourselves as a community, within a larger global community.<sup>4</sup>

## HISTORICAL DEVELOPMENTS

The current conception of refugees at the international level has distinct political and historical underpinnings. Although various definitions of refugees were formulated in the first half of the twentieth century,<sup>5</sup> it was following the Second World War that the international community made a concerted effort to deal systematically with displaced European refugees. World War Two revealed the limits of state-based international law in assisting individuals without effective state protection. The definition of a refugee that emerged was individualistic in nature and focused on political ideologies resulting in persecution. The codified definition of a refugee in the *1951 United Nations Convention relating to the Status of Refugees* is as follows:

...someone who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...<sup>6</sup>

This definition remains predominant today despite the presence of more expansive regional documents.<sup>7</sup>

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4. Donald Galloway, *Immigration Law* (Concord, Ont.: Irwin Law, 1997) at ch. 16 para. 2.

5. In the early 1920s, refugees were seen as international anomalies outside of their country of origin due to a lack of official travel documents or due to involuntarily revoked nationality. In the mid-1930s, refugees were seen as groups of "helpless casualties of broadly based social or political occurrences which separate them from their home society". James Hathaway, *Law of Refugee Status* (Toronto: Butterworths, 1991) at 3, 4.

6. Article 1(A)(2) *UN Convention*, *supra* note 1.

7. The *Convention Governing the Specific Aspects of Refugee Problems in Africa* follows the *UN Convention* definition but also defines a refugee as:

Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Article 1(2) *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 1001 U.N.T.S. 45 entered into force June 20, 1974.

The Organization of American States follows the *UN Convention* refugee definition but also extends protection to:

persons who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order.

Conclusion 3, *Declaracion de Cartagena, Annual Report of Inter-American Commission on Human Rights 1984-85*, OEA/Ser.L/II.66, doc.10, rev. 1 at 190-193 (1984). Approved by the 1985 General

The focus on individual political persecution in the UN refugee definition was a result of the historical context of Western political power at the outset of the Cold War. Humanitarian concerns emerging from World War Two offered the ideal forum in which Western nations could articulate human rights in terms of the supremacy of civil and political values. By emphasizing civil and political rights in the definition of refugees, Western nations concealed their own vulnerability in terms of the human rights protection of social and economic rights. Victims of political repression were granted the right to seek asylum; victims of major socio-economic deprivation such as the right to food and health care were not, unless the deprivation resulted directly from political status.

The creation of refugee law at this historical juncture focused on addressing the needs of European refugees.<sup>8</sup> Even when the emphasis on European refugees was formally removed in 1967,<sup>9</sup> the majority of refugees from third world countries remained excluded. As Hathaway points out, "their flight is more often prompted by natural disaster, war, or broadly based political and economic turmoil than by 'persecution' as understood in the Western context".<sup>10</sup> This problem has been compounded by the imposition of visa requirements, airline sanctions, and direct flight requirements by Western countries, including Canada.

## THE CANADIAN APPROACH

Prior to the Second World War, Canada did not have a specific policy for refugees.<sup>11</sup> Immigrants and refugees applied for permission to enter Canada through the same general immigration scheme, one that focused on promoting Canadian economic interests. Dirks writes:

The reasons for people's departures from their homelands seldom interested officials responsible for processing those who wanted to settle in Canada. Instead, migrants from abroad were looked at for what they had to offer in terms of satisfying labour market needs, supplying capital and know-how for job-creating projects, or simply settling the land.<sup>12</sup>

The early years of Canadian immigration law also sanctioned racial discrimination, preferring Northern Europeans with appropriate education and job skills.<sup>13</sup>

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Assembly of the Organization of American States.

8. Article 1(B) allowed countries signing the *Convention* to state whether their responsibilities were limited to refugees from Europe. The *Convention* was also limited to refugees prior to 1951. *UN Convention*, *supra* note 1.
9. Article 1(2) and Article 1(3) *Protocol Relating to the Status of Refugees*, 1966, 606 U.N.T.S. 267 entered into force on October 4, 1967.
10. Hathaway, *Law of Refugee Status*, *supra* note 5 at 10.
11. James Hathaway, "The Conundrum of Refugee Protection in Canada: From Control to Compliance to Collective Deterrence", in Gil Loescher, ed., *Refugees and the Asylum Dilemma in the West* (University Park, Penn.: Pennsylvania State University Press, 1992) at 71.
12. Gerald E. Dirks, *Controversy and Complexity: Canadian Immigration Policy during the 1980s* (Montreal: McGill-Queen's University Press, 1995) at 61.
13. Hathaway, "The Conundrum of Refugee Protection," *supra* note 11 at 72-73. For more on racism in

Canada slowly began to highlight humanitarian concerns as the underlying principle for refugee policy in the second half of the twentieth century. Following World War Two, Canada began to play a more active role in international affairs, promoting a humanitarian, multilateral, peace promoting self image. Canada played a large role in the creation of the *1951 UN Convention*, and eventually signed it in 1969. As a result, Canada was compelled to recognize refugees as a distinct category accepted into the country in accordance with humanitarian rather than economic guidelines. This shift was reflected in new national policy, the 1976 *Immigration Act*,<sup>14</sup> which incorporated the *1951 UN Convention* refugee definition.

In a report to the Minister of Employment and Immigration in 1985, policy advisor Plaut affirmed the principles to be enshrined in Canada's refugee policy. He stated:

Declaring a claimant to be a refugee is, then, not a privilege we grant, but rather a right we acknowledge. Canada has decided that it will be amongst those nations who extend a ready and cordial hand to the persecuted who have travelled far away from their home to seek a new life. The refugee determination process must therefore be seen and designed as an act of welcome. It must be forever responsive to our humanitarian impulses and obligations and wary of any encroachment that would seek to impose other considerations and concerns upon it.<sup>15</sup>

Accordingly, by 1989 the Immigration and Refugee Board (IRB) was established to oversee applications for asylum by refugees who entered Canada on their own initiative. By the mid-1990s, almost half of Canada's refugees were granted permanent residency through this inland process and were not selected abroad by the government. These refugees are deemed 'self selecting' refugees since they define themselves as persons in need of protection and arrive at Canada's borders to seek assistance. Once inside Canada, they are subject to refugee procedures and, according to the Supreme Court of Canada's decision in *Singh*,<sup>16</sup> are also subject to treatment in accordance with the *Canadian Charter of Rights*.<sup>17</sup>

In sum, the history of Canadian refugee law reveals the large impact that World War Two had on the creation of the current refugee scheme and on the current definition of a person in need of protection. It shows how Canada transformed its policies from a purely economic approach to immigration control to the adoption of a formal system

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Canada's early immigration laws, see: Lisa Jakubowski, *Immigration and the Legalization of Racism* (Halifax, N.S.: Fernwood, 1997).

14. *Immigration Act*, R.S.C. 1985, c. I-2.

15. W. Gunther Plaut, *Refugee Determination in Canada: Proposals for a New System. A Report to the Honourable Flora MacDonald, Minister of Employment and Immigration* (Ottawa, Ont.: Minister of Supply and Services Canada, 1985) at 17.

16. *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, 17 D.L.R. (4<sup>th</sup>) 422. *Singh v. M.E.I.* established that all persons who are physically present in Canada, not only Canadian citizens or permanent residents, are protected under the *Canadian Charter of Rights and Freedoms*.

17. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

of refugee adjudication based on international law and humanitarian values. The result of Canada's relatively generous refugee policies has been a large increase in the number of applicants. The *Safe Third Country Agreement*,<sup>18</sup> to which I now turn, is one way in which the government has sought to restrict the number of refugees gaining access to the inland refugee determination system.

## THE SAFE THIRD COUNTRY AGREEMENT

Essentially the *Safe Third Country Agreement* imposes a direct flight rule on refugees and in so doing creates an additional ground for refusing an application for asylum. In Canadian law and in accordance with the *UN Convention*, someone who meets the definition of a refugee can still be denied protection as a result of their criminal activity, involvement in terrorism, or if they have been granted refugee protection elsewhere.<sup>19</sup> The *Safe Third Country Agreement* goes a step further than the *UN Convention* and denies someone the right to file a refugee claim if he or she passed through a safe country prior to applying for asylum in Canada. A country is deemed to be "safe" if it signed the *UN Convention*, is democratic, has a good human rights record, and follows the rule of law.<sup>20</sup>

The idea of the *Safe Third Country Agreement* has been part of Canadian refugee law since the late 1980s. Although incorporated into the *Immigration Act*,<sup>21</sup> it had no immediate effect.

When Parliament was considering the *Safe Third Country* provision in the late 1980s there was considerable debate as to whether the United States could be considered a safe country for Salvadorans and Guatemalans. At the time, Canada was encouraging asylum seekers from these countries, who were without status in the United States, to seek protection in Canada.<sup>22</sup> As a compromise, the Minister of Immigration proceeded with the provision in the immigration legislation but did not pursue regulations designating any country as "safe".<sup>23</sup>

The United States was not then interested in actively pursuing such an agreement because it would result in the U.S. retaining a larger number of refugee applicants. Thus, although the idea of the Safe Third Country has been part of Canadian refugee law for over a decade and was recently reaffirmed in s. 101 (1)(e) of *IRPA*, prior attempts to give it force and effect were unsuccessful. Following September 11<sup>th</sup>,

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18. *Supra* note 3.

19. *IRPA*, *supra* note 2 at ss. 98, 101.

20. *Ibid.* at ss. 101(1)(e), 102(2).

21. *Supra* note 14 at s. 46.01(1)(b) (given that no country was listed as 'safe' according to s. 114(1)(s)).

22. In the past, the United States and Canada have had very different reactions to refugee claimants from Guatemala and El Salvador. In the late 1980s, the acceptance rate in the United States was about 2% whereas in Canada the acceptance rate was close to 70% according to Canadian Council for Refugees, "Interdicting Refugees" (May 1998), online: Canadian Council of Refugees <<http://www.web.net/~ccr/Interd.pdf>> (last accessed: May 2003).

23. *Supra* note 14 at s. 114(1)(s).

2001, however, Canada once again actively pursued listing the United States as a Safe Third Country and the U.S., in turn, became interested in signing.

There is no requirement in international law that refugees seek protection in the first country they enter or that refugees seek asylum in the country closest to their home.<sup>24</sup> There is an implicit freedom of choice as to which country refugee claimants select to pursue their claim. While the receiving country does not have a corresponding responsibility to accept the claim for refugee status, under international law refugees have the right to select their destination. The basic premise comes from the *Universal Declaration of Human Rights*, which notes that "Everyone has the right to seek and to enjoy in other countries asylum from persecution."<sup>25</sup> Conclusion 15 of the Executive Committee of the UNHCR confirms this entitlement with a minor qualification:

The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another state. Where, however, it appears that a person, before requesting asylum, already has a connexion or close links with another State, he may if it appears fair and reasonable be called upon first to request asylum from that State.<sup>26</sup>

Where it is reasonable for an alternate state to hear the claim and the decision is negative, the claimant retains the right to enter a country of choice to reapply for asylum.

However, Immigration and Refugee Board members have often tried to incorporate a type of direct flight requirement into the Canadian refugee determination system. They have done so by impugning the credibility of claimants who did not claim refugee status in a safe country of transit.<sup>27</sup> For instance, claimants from Poland of Roma ethnicity were denied refugee status because the Board found their indirect flight path indicated their lack of credibility. The fact that the claimants traveled through the U.S. and Mexico and abandoned their asylum claim in the U.S. was "inconsistent with a subjective fear of persecution".<sup>28</sup>

The Federal Court, on the other hand, has recognized that indirect flight alone is not sufficient to impinge a claimant's credibility. In the case above, for example, had the claimants come from Central America, their flight path through Mexico and the United States would make geographical sense. Furthermore, the abandoned claim is plausible

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24. *Supra* note 5 at 46.

25. *Universal Declaration of Human Rights*, GA Res. 217A (III), UNGAR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) at Art. 14(1).

26. Conclusion 15 (XXX) of the Executive Committee of the High Commissioner's Programme on "Refugees Without a Country or Asylum", 34 UN GAOR, Supp. No. 12A, 18 UN Doc. A/34/12/Add.1 (1979).

27. Lorne Waldman, *The Definition of Convention Refugee* (Toronto: Butterworths, 2001).

28. CRDD AAO-01089 (1 August 2002) (Immigration and Refugee Board – Refugee Division). See also CRDD T87-9902 (19 January 1988) (Immigration and Refugee Board – Refugee Division).



if the claimants always intended to make their refugee claim in Canada, but were detained during their travel through the U.S. The Federal Court has approached indirect flight as one factor amidst all others that help in assessing the claimant's credibility. If problems with credibility are established in other areas of the hearing, then indirect flight could confirm a lack of credibility.<sup>29</sup> However, the path of travel to Canada alone is not sufficient evidence on its own.<sup>30</sup> Failure to make a claim for refugee status in a country of transit could be an important consideration, but is not evidence of a lack of credibility if reasonably explained by the claimant.<sup>31</sup>

The *Safe Third Country Agreement*, however, does not give the asylum seeker the opportunity to explain the circumstance of his/her indirect route to Canada. Flight path is given priority over assessing the individual's need for protection. Canadian geography rather than Canadian humanity influences who has access to the Canadian refugee system.

Although the *Safe Third Country Agreement* is currently being pursued only with the United States, there is always the potential to designate further countries as safe. In submissions made to the American House of Representatives on the *Safe Third Country Agreement*, the executive director for the Center for Immigration Studies remarked that:

Once there is a safe third country agreement with the United States, there will be significantly less political resistance within Canada to adding European countries to a similar list should Canada's government think that advisable...<sup>32</sup>

As it is, the agreement with the United States would affect about one-third of the refugees who currently seek asylum in Canada each year. Should European countries be deemed safe third countries as well, Canada would further isolate itself from major refugee flows. Goodwin-Gill notes direct flight schemes "regionalize refugee problems" by attempting to keep those in need of protection within their regions of origin.<sup>33</sup> As a result, countries closer to sites of conflict assume a disproportionate share of the world's refugees.

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29. *Bessekri v. Canada (Employment and Immigration Commission)*, [1997] A.C.F. No. 45 (F.C.T.D.) (QL).

30. *Hue v. Canada (Minister of Employment and Immigration)*, [1988] F.C.J. No. 283 (F.C.A.) (QL) at para. 5.

31. For instance, a 78-year-old Baha'i woman from Iran significantly delayed in leaving Iran and stopped in the United States and Australia before coming to Canada. The court found that the Board ignored the totality of the evidence in considering her credibility and that her delays in applying for refugee status and leaving Iran were reasonably explained by illness. *Farahmandpour v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1839 (T.D.)(QL).

32. Hearing Before the Subcommittee on Immigration, Border Security, and Claims of the Committee on the Judiciary, House of Representatives, *United States and Canada: Safe Third Country Agreement* (Washington, D.C.: U.S. Government Printing Office, 2002) at 31. (Mark Krikorian) (*Hearing before Subcommittee*).

33. G. Goodwin-Gill, "Refugees: The Functions and Limits of the Existing Protection System," in A. Nash, ed., *Human Rights and the Protection of Refugees under International Law* (Halifax, N.S.: The Institute for Research on Public Policy, 1988) 149 at 152.

Compared to other forms of interdiction such as the imposition of a visa requirement, as a policy meant simply to reduce the number of refugee claimants in Canada the *Safe Third Country Agreement* is not necessarily the worst approach. At least in theory the refugee claimant has a safe place to make a claim for asylum. But it is essential to remember that:

The number of refugees [Canada is] asked to admit, and especially the number of inland refugee claimants, is small when compared to the vastness of our land, the wealth of its resources and the peaceful internal and external conditions which are Canada's.<sup>34</sup>

Moreover, there continue to be serious problems with listing the United States as a Safe Third Country.

According to Amnesty International, the United States follows practices that do not meet international standards of human rights. For instance, they often detain children seeking asylum along side criminals in juvenile and adult jails even though the children have not committed a crime. The U.S. has not ratified the *Convention on the Rights of the Child*;<sup>35</sup> it is the only country in the world other than Somalia to refuse to do so. In the United States, asylum applicants are refused work authorization for a minimum of five months and they are not entitled to free legal representation.<sup>36</sup> Furthermore, the U.S. allows foreign policy to influence its treatment of refugees. Detention, for example, is often based on nationality as well as racial and group profiling.<sup>37</sup>

United States jurisprudence imposes a higher standard of proof on refugee claimants than is required in Canada. The United States Supreme Court has upheld an interpretation of the *UN Convention* requiring that an 'alien' demonstrate a 'clear probability' of persecution in order to be deemed a Convention refugee and entitled to international protection.<sup>38</sup> In Canada, the standard of proof is based on a 'well-founded fear' of future persecution, and past persecution can establish a well-founded fear of future persecution.<sup>39</sup>

There are legitimate reasons why an asylum seeker would opt to claim refugee status in one country as opposed to a country of transit, such as wanting to be reunited with family and friends, or settle in communities where his/her language is spoken and the

34. Plaut, *supra* note 15 at 179.

35. Adopted 20 November 1989, GA Res.44/25, UN GAOR, 44<sup>th</sup> Sess., Supp. No.49, UN Doc. A/44/49 (1989) (entered into force 2 September 1990).

36. Title 8, *Code of Federal Regulations* (8 CFR) Sec. 208.7 (a)(1) (employment authorization); *Immigration and Nationality Act (INA)* 235(b)(1)(B)(iv) (legal representation "at no expense to the government").

37. For example, the U.S. automatically detains all Haitians who make refugee claims. Amnesty International Canada, "Canada: Are Canadians Prepared to Forcibly Return People to a Country Which...", online: AI <<http://www.amnesty.ca/library/news/June20-2002.htm>> (last modified: June 20, 2002).

38. *INS v. Stevic* (1984), 467 U.S. 407 at 430.

39. *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680, 57 D.L.R. (4<sup>th</sup>) 153 (C.A.) at 682 (F.C.).

culture is more familiar. Canadian jurisprudence has legitimized some of these personal decisions in selecting a country for asylum. A desire to distance oneself from the home state, concern regarding the true adequacy of protection, and preference to make a claim in a country in which one's language is spoken are reasons that have been accepted at the Federal Court of Appeal.<sup>40</sup> The Court has also considered factors such as a desire to be reunited with family, close friends, or an ethnic community, and the compatibility of the asylum state with personal needs and goals.<sup>41</sup>

There are some exceptions under the *Safe Third Country Agreement* for family reunification, people in transit, and unaccompanied minors. There are potential difficulties with each of these exceptions. First, the definition of "family" is tied to Western conceptions of the nuclear family. What constitutes a "family member" in some cultures will likely not be recognized under the *Agreement*. If a dependent child is defined as it is in the *IRPA*, i.e., the "biological child of the parent, or the adopted child",<sup>42</sup> expensive and intrusive DNA testing might be required to confirm that the child meets the definition of "family member". If DNA testing is negative, the *Agreement* will most likely exclude *de facto* family members.

Second, there is currently no definition of "in transit". It is often hard for refugees to come directly to Canada. It is easier to get flights to the United States. It may be easier to get an American visa because there are fewer Canadian consular offices overseas. Because of geography and cost, a huge proportion of Central Americans come to Canada by land. Under the *Agreement*, someone from Central America who took several months to transit through the U.S. to reach Canada would probably be deemed ineligible to pursue his/her claim. While not overtly racist, the effect of the *Safe Third Country Agreement* is that Canada can restrict access to its refugee determination system by controlling the location of visa offices and the availability of direct transportation.

Canada will likely face more unaccompanied minors who are sent ahead of family members to seek asylum in Canada. Determining the age of refugees without identity documents will be problematic. In addition to being difficult for the child, this will further burden Canadian child protection agencies. Given that Canada has signed the *Convention on the Rights of the Child*,<sup>43</sup> and that this convention has been incorporated into other aspects of *IRPA*,<sup>44</sup> new refugee policy ought to take into account the best

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40. *Owusu-Ansah v. Canada (Minister of Employment and Immigration)* (1989), 98 N.R. 312, 8 Imm. L.R. (2d) 106 (F.C.A.). On language, see also *Soueidan v. Canada (Minister of Citizenship and Immigration)* (2001), 22 Imm. L. (3d) 134, [2001] A.C.F. no 1397 (F.C.T.D.)(QL).

41. *Tung v. Canada (Minister of Employment and Immigration)* (1991), 124 N.R. 388, [1991] F.C.J. No. 292 (C.A.). See also *Thiruchelvam v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 1542 (T.D.)(QL). Although the judicial review application was dismissed on the facts of the case, Justice Lemieux considered the issues of friends, family and support in Canada as part of the reasonableness of not claiming in the United States (paras. 24-26).

42. *Immigration and Refugee Protection Regulations*, C. Gaz. 2002.11.19 at S.2.

43. *Supra* note 35.

44. *IRPA*, *supra* note 2 at s. 25(1) and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193.

interests of children. Although the exemption from the *Safe Third Country Agreement* for minor children protects them from inappropriate American detention, it is not evident that this is the most suitable solution for respecting the security of young children.

Finally, there are no provisions for the exercise of discretion on policy or humanitarian grounds. If found ineligible to pursue a claim in Canada, there is no appeal and it would be difficult to initiate any sort of s. 7 *Charter* claim for someone not physically in Canada. It would also be difficult to access a lawyer for judicial review if the decision was made in error. Thus, the *Safe Third Country Agreement* has a negative effect on refugee rights and on Canadian commitments to international human rights. The *Safe Third Country Agreement* imposes a direct flight requirement on refugees which, although not directly contravening the text of the *UN Convention*, significantly stray from it in spirit. The choice of the country in which to make one's claim for asylum is a small token of power for refugee claimants given the vast vulnerability they face in whether or not their claim for asylum will be accepted.

In conclusion, serious concerns for the rights of refugees remain by listing the United States as a safe country of transit and thus giving effect to a direct flight policy. The *Safe Third Country Agreement* allows Canada to abdicate responsibility for one-third of its potential refugee claimants. This is a significant number given that Canada is home to less than one-half of one percent of the world's refugees. Moreover, there has been no commitment that Canada will use the resources saved to contribute to the overall burden sharing of the world's refugees. The *Safe Third Country Agreement* is not consistent with Canada's humanitarian values or with the goals of the Canadian refugee program set out in s. 2 of *IRPA*.<sup>45</sup>

It is important to question why the *Safe Third Country Agreement* is being implemented at this time. Although the *Safe Third Country Agreement* serves mainly to reduce the number of refugee claimants entering the Canadian determination system, this has not been the focus of governmental justification for the agreement. In fact, if reducing the number of refugees in Canada was the only goal of the agreement, it is unlikely the United States would have pursued negotiations.<sup>46</sup> In

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45. *IRPA*, *ibid.* at s. 2: (a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted; (b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement; (c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution; (d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment; (e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings; (f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada; (g) to protect the health and safety of Canadians and to maintain the security of Canadian society; and (h) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

46. B. Frelick, Director, Refugee Program, Amnesty International USA in *Hearing before Subcommittee*, *supra* note 32 at 38:

examining the broader context surrounding the enactment of the *Safe Third Country Agreement*, I find that instances of abuse of the refugee system have been the focus of discussion. Specifically, the concerns focus on abuse of the system by economic migrants and by potential terrorists. I will review each of these issues in turn to evaluate whether the *Safe Third Country Agreement* is an appropriate policy response.

## ECONOMIC ABUSE

According to commentators in Canada and the United States, one of the purposes of the *Safe Third Country Agreement* is “to prevent asylum shopping in both the U.S. and Canada”.<sup>47</sup> The assumption is that people who are truly facing persecution in their home country would, and should, accept refugee status in any other country in which it was safe to do so.<sup>48</sup> If an individual fleeing persecution does not claim refugee status in the first safe country he/she enters, the individual must not be a genuine refugee. Rather, he/she is merely looking for a better country to live in and should have followed the guidelines for immigration rather than refugee determination. As John Manley, Canada’s Deputy Prime Minister, puts it: “It’s not a matter of shopping for the country you want... It’s a matter of escaping the oppression you face.”<sup>49</sup>

The perception that economic migrants abuse the Canadian refugee system has become quite prevalent in the last few years. This was an especially popular media perspective when a boatload of Chinese migrants reached the coast of British Columbia a few years ago. The migrants claimed refugee status upon their arrival and were granted a refugee hearing. The adjudicators found that the great majority did not have a fear of persecution and were returned home. Thus, the Chinese migrants were accused of attempting to jump the immigration queue by abusing the refugee determination system.<sup>50</sup>

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Why are we signing this agreement in the first place? Is there a flood of asylum seekers coming in from Canada that it seeks to deter in some way? No. Clearly, the numbers don’t add up. As the INS has given its own estimates, we are talking about maybe 200 people a year coming from Canada to the United States to seek asylum, and in the other direction last year it was about 15,000 people that went from the United States to Canada. And essentially what we are doing is telling these 15,000 people who want to apply for asylum in Canada that they can’t do that, that they have to apply for asylum here. And we are saying that at a time when we have 60,000 asylum applicants per year. We have a backlog of over 250,000 asylum cases... and we are talking about adding these numbers into an INS that is in transition.

47. *Ibid.* at 8. (Hon. George W. Gekas, Chairman of the Subcommittee).

48. “Proponents of this agreement argue that aliens should apply for asylum in the first safe country where they arrive rather than travel through more than one safe country and apply for asylum in their country of choice. They believe that a person truly fleeing for his life would ask for protection in the first safe country in which he arrived.” *Supra* note 32 at 9.

49. C. Clark, *et al.*, “Canada-US agree to ‘safe third country’ refugee pact” *Globe and Mail* (29 June 2002) A4.

50. Maytree Foundation, “Economic Migrants or Refugees? Trends in Global Migration”, online: Maytree Foundation <[http://www.maytree.com/PDF\\_Files/EMRproc.pdf](http://www.maytree.com/PDF_Files/EMRproc.pdf)> (last modified: January 12, 2000).

It is inevitable that, as a result of the inland refugee procedures, people will arrive in Canada to make an asylum claim based on difficult situations in their home country that do not necessarily fit within the refugee definition. For example, in the past individuals fleeing their home country due to threats to their life from the Mob would not have qualified as a refugee because the Mob was not an agent of the state. Alternately, individuals fleeing a country suffering from a food shortage due to a recent economic crisis would not qualify as a refugee because their situation was no different than the rest of the population in their home country, *i.e.*, the individual is not being personally persecuted on the basis of their race, religion, nationality, etc. In both of these examples, individuals may believe that their fear for their life is sufficient to allow them status as a refugee, and thus travel to Canada to seek safety. However, in each case they have come to be viewed very differently from the perspective of the Immigration and Refugee Board.<sup>51</sup>

The new *Immigration and Refugee Protection Act*,<sup>52</sup> enacted in June 2002, has expanded the definition of who qualifies as refugees in Canada to include the first example above. Section 96 of *IRPA* contains the *UN Convention* refugee definition. Section 97 of *IRPA* also includes those who face risk of torture and risk of cruel and unusual punishment if returned to their country of origin. Thus, the claimant fearing for his/her life due to threats from the Mob may now qualify under s. 97.<sup>53</sup>

Despite this extended refugee definition, there is presently no precedent that a person fleeing economic hardship constitutes a person in need of protection. The *UN Convention* narrowly defines protection according to immutable personal conditions such as race, ethnicity and religion. Economic class on its own does not constitute grounds for persecution unless it is connected with one of the factors above. In a conference on global migration trends, Head concluded that:

The recognition of economic hardship as a valid qualification for entry, without more, would suggest to hundreds of millions of persons in the developing countries that Canada is able to embrace them and offer them an enhanced livelihood.<sup>54</sup>

This, he claims, is an untenable proposition. Given that class does not yet constitute an analogous ground under the *Charter*, it remains extremely difficult to argue that economic status ought to be grounds for a refugee claim in Canada.<sup>55</sup>

51. See for example: *MA1-11335* (4 November 2002) (Immigration and Refugee Board – Refugee Protection Division). The claimant was threatened by drug traffickers and no state protection was available in Colombia. His application for refugee status was granted. In contrast, see: *RPD TA1-17388* (10 March 2003) (Immigration and Refugee Board – Refugee Protection Division). The claimant feared persecution from Hutu rebels in Burundi. The panel found the claimant to be credible but did not accept the claim because “the claimant’s fear was the same as that felt by the people of Burundi, regardless of ethnic background.”

52. *Supra* note 2.

53. *Supra* note 51. Note: the claimant threatened by the drug trafficker was granted refugee status. See also *TA0-2033* (2 October 2002) (Immigration and Refugee Board – Refugee Protection Division).

54. Head in *Maytree Foundation*, *supra* note 50 at 9.

55. See also *RPD TA1-19010* (26 August 2002) (Immigration and Refugee Board – Refugee Protection

It is inappropriate, however, to view economic migrants as criminals seeking to abuse the system because for the most part there is no legal alternative for entry into Canada. Furthermore, Canada's support for economic globalization and free trade makes Canada implicitly responsible for patterns of economic migration. Increasing disparities in income and living standards between the North and the South cause people to move internationally, seeking improved living conditions. The desire to seek opportunity for economic progress for oneself and one's family is neither dishonourable nor deceptive. In fact, economic migration is a key component of the current system of globalization. The capitalistic system "lauds corporations for being economic migrants. We praise them for their deftness in crossing international boundaries or in ignoring them."<sup>56</sup> People with money are able to pursue their fortunes across international borders as well. Corporations and people with money are free to cross borders to improve their economic condition. Poor people, on the other hand, become criminalized for attempting to do the same.

Leaving aside the debate, however, about whether economic migration of the poor ought to be recognized more fully within the world system, the large influxes of economic migrants through refugee channels have become a growing concern for policy makers.<sup>57</sup> The regulatory impact analysis statement for the *Safe Third Country Agreement* explicitly acknowledges that it is instituted in part to control "economic migrants". It states:

The global growth of irregular migration, and in particular the contemporary phenomenon of "mixed flows" of migrants, refugees and asylum seekers who move together through the same irregular channels, has resulted in significant pressures on asylum systems in developed countries, including Canada and the United States. Migrants attempt to make use of asylum systems to secure entry to a developed country and the attendant economic opportunities. Asylum seekers pass up opportunities for protection closer to home in order to claim refugee status in a developed country, again usually for economic reasons.<sup>58</sup>

By connecting the issue of economic migrants entering the refugee system with the idea that genuine refugees are seeking protection in economically prosperous countries, the *Safe Third Country Agreement* tends to conflate the two issues. In this way, the choice to pass up refugee protection closer to home or in the first safe country entered can be interpreted as a sign that the individual is not seriously in need of protection.

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Division). The claimant feared violence and crime in Jamaica and feared that she would have trouble finding a job due to the poor economy. The panel found that membership in a lower income group was not an immutable social group and therefore her claim for refugee protection could not succeed.

56. T. Singh in *Maytree Foundation*, *supra* note 50 at 33.

57. "House of Commons Standing Committee on Citizenship and Immigration Evidence" (17 November 1999) online: Parliament of Canada <[www.parl.gc.ca](http://www.parl.gc.ca)> (last modified November 17, 1999) at 168-198.

58. *Regulations Amending the Immigration and Refugee Protection Regulations*, C. Gaz. 2002.I.3241.

Economic migrants who abuse the refugee system, and genuine refugees who have considered economics as a factor in their choice of country, however, are two separate issues. Rather than developing effective ways to manage economic migrants, the *Safe Third Country Agreement* seeks to deflect both economic migrants and genuine refugees from entering Canada. The *Agreement turns all applicants for asylum back to the United States based only on their physical route to Canada, not on the merit of their claim or the degree to which economics influenced their choice of destination.* The *Agreement* is not effectively deterring abuse by economic migrants; instead, it is undermining the credibility of potential genuine refugees without giving them procedural rights to present their case.<sup>59</sup>

First, given that the *Safe Third Country Agreement* is only currently being pursued between Canada and the United States, there is little reason to believe that the *Agreement* will deter either economic migrants or refugees seeking protection in a prosperous country. The effect of the *Agreement* is for Canada to return the individual to the United States, and vice versa. It is difficult to argue that this policy will discourage refugees or economic migrants from arriving in either country. Both Canada and the United States are economically prosperous. If economic arguments represent the genuine concern behind enacting the *Safe Third Country Agreement*, additional countries will need to be deemed safe. One must seriously be concerned that Canada is already contemplating such isolationist measures.

Second, if a refugee claimant has traveled through the United States to pursue a claim in Canada, it is unlikely the result of economic choices. Given the relative prosperity of both countries, it is more likely that the political or social environment influenced the decision. For genuine refugees seeking personal protection, the small but important distinctions between Canada and the United States can make a significant difference in the adjudication of their claim or in their personal sense of security. The *Safe Third Country Agreement* may force the refugee to find covert means for entering the country, because once a refugee claimant is in Canada the *Safe Third Country Agreement* no longer applies.

The *Safe Third Country Agreement* is not effective in deterring economic migrants or economic considerations of refugees. It deflects all claimants, regardless of their individual situation, from pursuing protection in Canada. While deterring purely economic migrants from entering the refugee determination system may be a valid goal, it should not be done at the expense of genuine refugees. It is problematic to turn away *Convention*-based refugees in need of protection merely because they may have considered Canada's economic situation, among other personal factors, in choosing to seek asylum in Canada.

Potential refugees may face political barriers to their claim in the United States and thus the *Agreement* has the potential to deny protection to a person in need. As Plaut

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59. For example, a refugee from South America may have difficulty fleeing directly to Canada, but may have good reasons (aside from economics) for requesting asylum in Canada given American support for various South American political regimes.



proclaims, “until we know something about the claimant we cannot be sure that he/she is indeed not a Convention refugee.”<sup>60</sup> Knowledge of the geographical path taken to Canada is not sufficient to make this determination.

Nonetheless, the *Agreement* will be difficult to challenge legally. In *Berrahama v. M.E.I.*,<sup>61</sup> the Supreme Court found that screening procedures established to restrict access to the Immigration and Refugee Board do not necessarily offend the *Charter*. By the same token, in *Nguyen v. M.E.I.*<sup>62</sup> the Federal Court found that a declaration of ineligibility was not a positive act that led to a s. 7 claim on life, liberty or the security of the person. As a result, in theory the *Safe Third Country Agreement* will likely not offend the *Charter*. However, in practice, the *Safe Third Country Agreement* does not conform to Canadian standards of international human rights.

As a result, I conclude that instances of abuse of the refugee system by economic migrants do not justify the enactment of the *Safe Third Country Agreement*. First of all, the *Agreement* is ineffective in deterring economic abuses by migrants or by refugees. Rather, the discourse of economic abuse causes genuine refugees to be deterred without a proper adjudication of their claim. Deflection due to the *Safe Third Country Agreement* “undermines the very refugee protection system that it is presumably designed to safeguard”<sup>63</sup> according to the humanitarian objectives outlined in *IRPA*.<sup>64</sup>

## SECURITY ABUSE

While the abuse of the refugee system by economic migrants caused concern for public officials, the possibility of terrorists abusing the refugee system caused significant fear in the public at large. Canada as a “safe haven for terrorists” became a national concern in the months following September 11<sup>th</sup> and has remained a pervasive discourse. Almost a year following the September 11<sup>th</sup> attacks, the *Toronto Sun*’s front page ran the headline “Poll: Clean up immigration mess”, stating that 69% of Canadians wanted tighter immigration laws.<sup>65</sup> The narrative that developed is that Canada has a lax immigration and refugee system making our country a “terrorist’s dream”.<sup>66</sup> Canada’s immigration and refugee policy supposedly threatens the safety and security of North America.

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60. Plaut, *supra* note 15 at 92.

61. *Berrahama v. Canada (Minister of Employment and Immigration)* (1991), 132 N.R. 202, [1991] F.C.J. No. 180 (C.A.)(QL).

62. *Nguyen v. Canada (Minister of Employment and Immigration)*, [1993] 1 F.C. 696, 100 D.L.R. (4<sup>th</sup>) 151 (C.A.).

63. J. Hathaway & A. Neve, “Fundamental Justice and the Deflection of Refugees from Canada” (1996) 34 Osgoode Hall L.J. 213 at 275.

64. *Supra* note 45.

65. R. Granatstein, “‘Al—Qaida’s Here’: Poll results blast immigration laws and sloppy border” *Toronto Sun* (8 September 2002) 1 at 4. [sic]

66. L. Williamson, “Soft underbelly: When will the feds get it? We’re a target for terrorism” *Toronto Sun* (5 September 2002) online: Toronto Sun <[http://cgi.canoe.ca/CNEWSSept11Columns/sep5\\_](http://cgi.canoe.ca/CNEWSSept11Columns/sep5_)

Canadian officials have argued that the *Safe Third Country Agreement* is one of the many policies of interdiction necessary to encourage national security. The *Safe Third Country Agreement* is only one of many strategies Canada has employed to maintain control over those who gain access to the refugee determination system and to encourage trust in the system in a post 9-11 security conscious environment. The five point border plan included new permanent resident cards, tighter security screening, increased detention and deportation capabilities, hiring of new staff at the ports of entry, and the *Safe Third Country Agreement*.

Some of these policies may in fact be effective in promoting security. Increased cooperation between Canada and the United States in sharing information and intelligence gathering, for example, does help both nations decide whether someone represents a risk to North American security. Since security screening will take place regardless of whether or not September 11<sup>th</sup> had occurred, the pooling of resources to do so amounts to a more effective and cost efficient manner of screening potential applicants.

However, as Adelman notes,<sup>67</sup> although these policies have all been enacted in the name of security, some have relatively little to do with increased security needs. For example, the imposition of a visa requirement for people coming from Zimbabwe in no way encourages a focus on genuine refugees in need of protection in a security conscious world. Of the 1,652 Zimbabweans that made claims in Canada in the year 2000, seventy percent were successful. Therefore, "the decision to restrict entry of Zimbabweans deters genuine refugees even though there has been no evidence of a security threat from Zimbabwe."<sup>68</sup>

The *Safe Third Country Agreement* does not increase security, nor does it allow for a focus on genuine refugees. The effect of the *Agreement* is to send the individual back to the neighbouring country. If the *Agreement* remains only between Canada and the United States, North America will only be safer if the American policies are more effective in routing out security threats. Despite the mass media accusations and the American rhetoric following September 11<sup>th</sup>, there is no proof that the American refugee system is more effective in doing so. American policies of mass detention and a more restrictive interpretation of the refugee definition reduce the rights of genuine refugees with no links to terrorist activity. While Canada may want to deflect responsibility for any potential terrorists, it is inappropriate to condone American procedures that contravene international law and put refugees at risk.

If American procedures continue to erode the rights of refugees, it is likely that claimants will have greater incentive to seek protection in Canada. Since the *Safe Third Country Agreement* only applies to claimants at the border and not to those who are already inside the country, the agreement encourages covert border crossings. This unnecessarily puts refugees' lives at risk. As Macklin puts it, "That will likely mean

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[williamson.html](#)> (last modified: September 2002).

67. H. Adelman, "Refugees and Border Security Post- September 11" (2002) 20 *Refuge* 4.

68. *Ibid.* at 5.

more money for human smugglers, more clandestine traffic between the border, and more – not less – insecurity for governments trying to regulate and monitor border movement.”<sup>69</sup> As a result, “the agreement is packaged as a security measure, but is more likely to undermine national security than enhance it.”<sup>70</sup>

The *Safe Third Country Agreement* reduces the rights of vulnerable refugees without furthering the goal of increased national security. The Canadian Council for Refugees has called the *Safe Third Country Agreement* the new “None is Too Many Agreement”, referring to the turning away of Jewish refugees fleeing Hitler’s regime, because Canada is once again closing its borders in a time of uncertainty.<sup>71</sup> Security intelligence reports acknowledge that there are individuals in Canada who support the use of terrorism. But there is no proof that refugees or even failed refugee claimants constitute the majority, or even a significant number, of these people. It is just as possible for Canadian citizens to be involved in international criminal activity as anyone else. Rather than making vulnerable refugees the scapegoat, more effective ways of combating terrorism are required.

Zulaika and Douglas in *Terror and Taboo* state that:

...Far from being a benign or gratuitous labeling exercise, the stark issue of who has the power to define another as a terrorist has obvious moral and political implications...<sup>72</sup>

The adage is that “one person’s freedom-fighter is another’s terrorist.” The notion of a terrorist is a politically laden idea. How to combat terrorism is often a political matter. Politically popular responses, however, are not always the most effective way to deal with international criminal activity. Instead of identifying the root causes of the terrorism and attempting to address them, political responses tend to be short term solutions intended to show the public that something is being done. In all essence, though, what is being done gives the populace a false sense of security. Until the underlying roots of terrorist attacks are addressed, current North American policy will provide only temporary sanctuary at best.

In response to the terrorist attacks, American politicians focused on trying to increase security within their borders. Among other things, it has meant increased security at the Canadian-United States border and at airports. It has meant increased surveillance of people of certain racial backgrounds and the enactment of anti-terrorism legislation allowing the government to curtail civil liberties in order to combat terrorism. It has also meant pressuring Canada to enter into agreements to harmonize immigration and

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69. A. Macklin, “CBC Commentary”, online: CBC <<http://cbc.ca/commentary>> (last modified: July 2002).

70. *Ibid.*

71. Canadian Council For Refugees, “10 Reasons Why the US-Canada Refugee Deal is a Bad Idea”, online: CCR <<http://www.web.net/~ccr/10reasons.html>> (last modified: July 2002).

72. J. Zulaika & W. Douglas in S. Aiken, “Manufacturing ‘Terrorists’: Refugees, National Security, and Canadian Law” (2000) 19 *Refuge* 3, online: Centre for Refugee Studies <<http://www.yorku.ca/crs/DMs%20Refuge%20Pages/Vol%2019%20No%203/Aiken.pdf>> (last modified: December 2000).

refugee policies with those of the United States and to assist in creating a security perimeter around North America. The thrust of the campaign has been to create "Fortress America"- to secure those within by keeping the terrorists out.

However, "the proliferation of border controls, the repression of foreigners, and so on, has less to do with protection than with a political attempt to reassure certain segments of the electorate longing for evidence of concrete measures taken to ensure safety."<sup>73</sup> It does little to understand the movement of people and ideology worldwide nor the deep resentment against the United States that exists on a global scale. With the United States refusing to be a part of the World Criminal Court and pursuing a unilateral war on Iraq, its international policies go against a true policy for security.<sup>74</sup> Given the continued threat of and actual terrorist attacks linked to Al-Qaeda, it is clear that American protectionism has not reduced the threat of terrorism and should be proof that security measures cannot be limited to protection within national borders.

As Bigo from the Institut d'Etudes Politiques in Paris states:

...it [is] imperative to insist that the context created by the [September 11<sup>th</sup>] attacks in no way justifies security measures aimed at limiting immigration and asylum. To revive myths of absolute sovereignty and border impenetrability, or to pretend that technical solutions can completely prevent new attacks, is to ignore the powerful trends in contemporary societies toward the multiplication of flows (capital, ideas, information, goods, people) and the growing speed of their circulation... **Clandestine organizations cannot be stopped by physically closing all borders, which must reopen sooner or later unless there are deep changes in the economic and political status quo.**<sup>75</sup>

The us/them, insider/outsider dichotomies serve to strengthen an inward looking approach to security. However, in a globalized world and our multicultural Canadian society, this type of security will remain ineffective.

Following September 11<sup>th</sup>, the United Nations High Commissioner for Refugees explicitly warned of the potential for public perception of refugees to create unwarranted links between refugees and terrorism. By associating refugees in general with terrorism, "bona-fide asylum seekers may be victimized as a result of public prejudice and unduly restrictive legislation or administrative measures."<sup>76</sup> Equating

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73. L. Limon, "Don't Make Refugees Pay the Price for September 11", online: U.S. Committee For Refugees <<http://www.refugees.org/news/crisis/resettlement/070802lavina.cfm>> (last modified: July 8, 2002).

74. Mark Gibney writes that scholars of American refugee policies often ignore American complicity in the creation or perpetuation of refugee flows while pursuing their foreign policy objectives. As Gibney puts it, "rather than simply viewing the United States as a *recipient* of refugees, inquiry should focus on the United States as the *creator* of refugee flows". M. Gibney, "U.S. Foreign Policy and the Creation of Refugee Flows," in H. Adelman, ed., *Refugee Policy: Canada and the United States* (Toronto: York Lanes Press, 1991) at 81.

75. D. Bigo, "To Reassure, and Protect, After September 11", online: Social Science Research Council <<http://www.ssrc.org/sept11/essays/bigo.htm>> (last modified: September 7, 2002). [emphasis added]

76. United Nations High Commissioner for Refugees Press Release, "Ten Refugee Protection concerns in

asylum with the provision of a safe haven for terrorists despite the fact that these links have been unsupported by facts “vilifies refugees in the public mind...”<sup>77</sup> and allows overly broad policies such as the *Safe Third Country Agreement* to be instituted.

The reality is that refugees are scrutinized at every step in the process. They are fingerprinted and must provide security checks and proof of their identity. Limon, a former State Department official in the Clinton administration who is now executive director of Immigrant and Refugee Services of America, states that refugees undergo the most stringent background checks of anyone seeking admission to the United States. If you wanted to come to this country as a terrorist,” she says, “coming as a refugee has to be the stupidest way to come”.<sup>78</sup>

It is reasonable to inquire how to increase security safeguards in the international movement of peoples. However, the inquiry ought to be answered in such a way that genuine refugees are not immediately viewed as criminals regardless of their actual situation and their lack of involvement in terrorist activity. A balance must be struck between security safeguards and refugee protection. At the very least, policies that restrict the rights of refugees ought to be carefully considered in order to ensure that the policies are effective in pursuing their objectives and that the rights of refugees are minimally impaired. The *Safe Third Country Agreement* is not an effective way to ensure national security and the restrictions it places on the rights of refugees are unjust and inappropriate.

## CONCLUSION

This agreement doesn't make sense from an administrative, security or humanitarian perspective. Why then are we pursuing this?<sup>79</sup>

In this paper, I have examined the situations surrounding the signing of the *Safe Third Country Agreement*. Specifically, I have explored the instances of abuse of the refugee system by economic migrants and by potential terrorists. In critically analyzing the *Safe Third Country Agreement*, it becomes apparent that it is not an effective policy for deterring either form of abuse. The *Agreement* does not deter economic migrants nor does it protect North America from terrorist threats. Rather, these discourses of abuse tend to conceal the problematic aspects of the *Agreement* and its detrimental effects on the rights of refugees. I conclude that the *Safe Third Country Agreement* is overly broad, with inadequate justification for its enactment.

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the aftermath of Sept. 11”, online: <[www.baltic-refugee.net](http://www.baltic-refugee.net) [http://home.arcor.de/frsh/englisch/2\\_refugee.htm](http://home.arcor.de/frsh/englisch/2_refugee.htm)> (last modified: Oct. 23, 2001).

77. *Ibid.*

78. L. Limon in S. Sengupta, “Refugees at America’s Door Find It Closed After Attacks”, online: *The New York Times* <<http://www.nytimes.com/2001/10/29/nyregion/29REFU.html>> (last modified: October 29, 2001).

79. House of Commons, Standing Committee on Citizenship and Immigration, *The Safe Third Country Regulations* (Ottawa: Standing Committee on Citizenship and Immigration, 2002) at para.13 (New Democratic Party’s submissions).

In peeling away the economic and security façade, one is faced with the stark reality that the *Safe Third Country Agreement* is meant mainly to reduce the number of refugee claimants in Canada. The *Safe Third Country Agreement* will close the border to one-third of potential refugee claimants, a significant number given that Canada is home to less than one-half of one percent of the world's refugees. This kind of protectionism is inappropriate for a country that prides itself on being a leader in international human rights and international cooperation.

United Nations Secretary General Kofi Annan recognized that there has been a growing tendency to equate refugees "at best with economic migrants, and at worst with cheats, criminals, or even terrorists."<sup>80</sup> Global criminal movements such as drug trafficking, arms trafficking, smuggling, money laundering, terrorism and international criminality have been superimposed upon the movement of refugees worldwide. These connotations are disturbing given that refugees seek to escape desperate situations of human rights violations. It is also disturbing that these images have influenced the development of ineffective policy that restricts the rights of refugees.

Upon reflection, I conclude that the stories of the refugee claimants affected by the *Safe Third Country Agreement* are unlikely to be heard. They are voiceless and faceless, and thus the consequences of their interdiction remain unknown. In the place of true refugee narratives are instances of abuse that have powerful influences over public perceptions and policy choices. Perhaps it is only by seeking to tell the stories of refugees affected by the *Safe Third Country Agreement* that the consequences of this overly broad policy will be illuminated. Perhaps then Canadian humanitarian values will help return refugee law to a more even balance between refugee rights and national policy interests.

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80. General Kofi Annan in R. Wilkinson, "Refugees and asylum seekers worldwide feel the effects of the September attacks in the United States" (2002) 125 *Refugees Magazine*, online: UNHCR <<http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.htm?tbl=MEDIA&id=3ccd58429&page=publ>> (last modified: January 2002).